No. 10708

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY
and L. R. DONNELLY,

Appellants

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,
both minors, by their Guardian ad litem, George H. Newby

Appellees

Brief of Appellants

On Appeal from the District Court of the United States for the District of Idaho, Eastern Division

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JURISDICTION

This action was commenced in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake on September 29, 1942 by the filing of a Complaint by George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian ad Litem, George H. Newby, against R. J. Reynolds Tobacco Company, a corporation organized under the laws of North Carolina, and L. R. Donnelly and Rulon D. Hair, residents and citizens of the State of Utah, to recover $383.20 special damages, and $100,000.00 general damages, and costs

of suit for alleged injury to, and death of Avenell Newby, wife of George Newby and mother of the two minors (R.2-7).

October 26, 1942, an Order was made by the State District Court for removal of said cause to the United States District Court for the District of Idaho, Eastern Division (R.10-11), the jurisdiction thereof having been invoked under Section 24 of the Judicial Code as amended, 28 U.S.C.A. Sec. 41. November 12, 1942, appellants filed a motion to dismiss and to make more definite and certain (R.11-12), which motion was denied (R.14-16). Appellants thereupon filed an answer (R.17-22). All parties demanded a jury trial (R.16, 22, 28).

April 5, 1943, appellees filed a motion for an order permitting them to file an amended complaint (R.32). Objections to filing the amended complaint were filed (R.32-34), which were overruled (R.36). An amended complaint was filed February 9, 1943 (R.37-41). Appellants thereupon filed motion to dismiss and for more definite statement, and motion to strike from said amended complaint (R.41-44). July 6, 1943, the trial Court denied the motion to dismiss and for more definite statement, and granted the motion to strike in part (R.46, 47). July 15, 1943, appellants filed an answer to the amended complaint (R.47-54). October 20, 1943, appellants filed a motion to require appellees to elect upon which of the two theories, alleged in the amended complaint, they intended to rely for a verdict, and to strike the allegations of the theory not elected (R.61, 62). October 20, 1943, this motion was denied (R.64).

The cause proceeded to trial before Honorable Chase A. Clark, District Judge, and a jury. October 23, 1943, the jury returned a verdict against appellants and Rulon D. Hair for $7500.00 (R.68), upon which verdict judgment was entered (R.70). Appellants thereupon filed a petition on motion for judgment notwithstanding verdict and in the alternative, for a new trial (R.71-82), which was denied January 5, 1944 (R.86).

Notice of appeal was filed by appellants on January 20, 1944 (R.87), under Rule 73 and 74 of the Rules of Civil Procedure. The defendant, Hair, did not appeal. Bonds on appeal and for supersedeas were thereupon filed and approved (R.88-93). The record on appeal was certified by the Clerk of the District Court on March 13, 1944 (R. 409). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended, 28 U.S.C.A., Sec. 225 (a).

STATEMENT OF THE CASE

This is an action for damages filed by appellees against appellants and Rulon D. Hair for injuries to, and death of Avenell Newby, wife of George H. Newby and mother of the minors. September 11, 1942, at about 4:30 P. M., Rulon D. Hair was transporting Avenell Newby as a guest in a Chevrolet Panel Truck on U. S. Highway No. 30 North. At a point about 17 miles North of Montpelier, Idaho, the car was upset, Avenell Newby injured, and from such injuries she died on September 16, 1942.

For several years prior to the accident, Rulon D. Hair had been employed by R. J. Reynolds Tobacco Company as a

salesman and used an automobile of R. J. Reynolds Tobacco Company in his operations. L. R. Donnelly was also in the employ of R. J. Reynolds Tobacco Company as District Manager, and had direct supervision over Rulon D. Hair. The panel truck which Hair was then driving, was delivered to Hair under instructions that he was never to use it for transporting a guest. This instruction was oral and also contained in various bulletins (R.311-313), and in the receipt signed by Mr. Hair when he received possession of this panel truck in the following language:

> "I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my Division Manager. I understand that under no consideration am I to permit anyone, save and except an employee of R. J. Reynolds Tobacco Company, to ride with me in said car." (R.206, Def. Exhibit 14).

On September 10, 1942, during the evening and at the solicitation of Avenell Newby (R.314, 355), Rulon D. Hair transported Avenell Newby in this truck from Montpelier, Idaho, to a night club called "Aero Club" east of Montpelier. They remained at that place, where they danced and drank, until about 2:00 or 3:00 o'clock A. M. on the morning of the 11th of September (R.297). They then left the Aero Club, drove back to Montpelier and from there to Soda Springs, Idaho, a distance of about 30 miles, to visit another night club (R.298), arriving at Soda Springs about 4:30 or 5:00 o'clock A. M. (R.299, 319). This club was closed. They thereupon went to Enders Hotel in Soda Springs where they remained until about noon of September 11 (R.320).

They then went to the Oasis Club in Soda Springs, where Mrs. Newby drank intoxicating liquors; they remained there until about 2:30 o'clock P. M. (R.321).

They then drove to Grace, Idaho, where Hair intended to see some salesmen to get them to advise his wife at Pocatello, Idaho, that he would be later than usual in getting home, (R.321); then they started for Montpelier, Idaho, for the purpose of taking Mrs. Newby back to her home (R.321-2).

Mr. Hair and Mrs. Newby were together on a party of their own for a period of about 18 hours, during which time Hair admitted he was doing no business whatever for his employer (R.316). It is undisputed that during that time the two were eating, drinking, dancing, etc. On the way home from Soda Springs to Montpelier on Highway No. 30 North, the car seemingly went out of control and tipped over (R. 302). Mrs. Newby was seriously injured and died a few days later.

Following the death of Avenell Newby, appellees instituted this suit against appellants and Rulon D. Hair, jointly, charging that Hair was in the employ of appellants and, while acting within the scope of his employment, transported Avenell Newby as a guest and while so doing, negligently and recklessly drove said truck so that it was upset upon the highway, causing the injuries heretofore recited, and claimed damages against appellants and Hair (R.2-7).

At the time of the accident, there was and still is in existence in Idaho, Section 48-401 I.C.A., 1932, as amended by Chapter 160 of the Session Laws of 1939, limiting the rights

of a guest against the operator of a motor vehicle for damages, reading as follows:

> "48-901. LIABILITY OF MOTOR OWNER TO GUEST. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others."

After the case had been removed to the United States District Court, appellees, over the objections of appellants, were permitted to file an amended complaint wherein it was recited that Avenell Newby was riding in the panel truck with Rulon D. Hair as his guest and guest of appellants and, that appellants permitted Hair to use the truck upon the highway knowing that he was a careless, reckless and incompetent driver and in the habit of hauling guests contrary to instructions. Appellants answered the original complaint (R.17-22); likewise answered the amended complaint (R.47-54). In their answer to the amended complaint, appellants alleged that Hair had been acting as a salesman for R. J. Reynolds Tobacco Company prior to September 11, 1942, but that he was not in the scope or course of his employment at the time the accident occurred, in that he was entirely on a party of his own and acting contrary to instructions. Appellants denied that Hair was a careless, reckless or incompetent driver of an automobile or that he had hauled guests therein, alleging that if he had hauled such guests, it was without appellants' knowledge or consent. As affirmative defenses, appellants alleged contribu-

tory negligence on the part of Avenell Newby and that she, as a gratuitous guest of Rulon D. Hair, fully and freely acquiesced in everything done by him in the driving of said truck and, therefore, assumed all risks attendant to the trip and, that the injuries which she may have sustained, and damages, if any, thereby suffered by appellees, were the result of matters over which appellants had no control.

Before the trial commenced, appellants moved to compel appellees to elect upon which of the two theories, stated in their amended complaint, appellees would proceed to trial; that is to say, whether they would proceed upon the theory that the defendants were guilty of violating the Idaho Guest Statutes and, therefore, liable for the consequences, or whether they would proceed upon the theory of simple negligence on the part of appellants in permitting Hair to use and operate the panel truck (R. 61-62, 94). The motion was denied (R.64, 95-96). The case proceeded to trial on the issues thus framed and resulted in a verdict and judgment against the appellants and Rulon D. Hair for $7500.00 and costs (R.68-71).

At the trial, over objections of appellants on grounds of immateriality and in nowise proving or tending to prove the status of Hair as a careless and reckless driver, the Court permitted proof of an accident in which Hair was involved in Pocatello, Idaho, about 3½ years prior to the accident involved in this case (R.190,200, 222-226, 230-234). The Court also permitted testimony, over the objection of the appellants that same was immaterial and irrelevant, of an arrest during July, 1939, of a man named B. R. Hair, Soda

Springs, Idaho, in Clark County, Idaho, without any showing at all that either of appellants had any knowledge whatever of such occurrence or that it involved Rulon D. Hair (R.214, 286-291); further, over objection of appellants, the Court permitted some testimony that on three or four occasions during approximately four years, Hair had a guest in his car (R.211-213).

At the conclusion of the evidence the appellants moved for a directed verdict on the grounds that the evidence was insufficient; which motion was denied (R.359-362).

After entry of the judgment, appellants moved for judgment notwithstanding the verdict and, in the alternative, for a new trial, (R.71-82), which motion was denied (R.86). Appellants objected to several of the instructions of the Court given to the jury and also to the refusal of the Court to give certain instructions requested by appellants (R.376-394) quoted in the specifications of error.

Appellants' position on this appeal is that they are in nowise liable for the conduct of Rulon D. Hair at, and for a time prior to, the accident involved in this case; that no liability of appellants existed in favor of Avenell Newby or appellees; that the trial Court erred in its rulings touching the pleadings, on various items of evidence in giving and refusing various instructions, its denial of appellants' motions for directed verdict, and for judgment notwithstanding the verdict and, in the alternative, for a new trial, all of which, including the manner in which they were raised, will be more fully explained in the specifications of error and argument to follow.

QUESTIONS PRESENTED

1. Whether the amended complaint states a claim, and whether the causes of action therein stated can be commingled in the manner attempted, viz., an action for violation of the Idaho Guest Statute, and an action against an employer for simple negligence. The questions are raised by motion to dismiss and elect.

2. Whether or not the Court erred in admitting the evidence produced by appellees, claimed to prove Hair was a reckless and incompetent driver and if so, whether appellants knew this. These questions are raised by objections to the evidence and motions to strike.

3. Whether the evidence as a whole can support the verdict. This question is raised by motion for a directed verdict, and by motion for judgment notwithstanding the verdict.

4. Whether the instructions given by the Court and excepted to by the appellants, were erroneous and, whether the Court erred in refusing to give certain requested instructions, all of which are stated in the specifications of error. These questions arose upon exceptions stated at the time the jury was instructed.

5. Generally, whether under the pleadings and evidence appellants are liable to appellees, grounded upon the insufficiency of the amended complaint to state a claim, and the insufficience of the evidence to support any verdict or judgment against appellants.

SPECIFICATIONS OF ERROR

I.

The trial Court erred in permitting appellees to file their amended complaint in this cause, more particularly because the allegations contained therein charging appellants with negligence in employing Rulon D. Hair and entrusting him with an automobile (Par. VI-VII, R.38-39), are wholly insufficient to place in issue such charge of negligence and is inconsistent with a charge of violation of the Guest Law of Idaho (Appendix No. 1).

II.

The Court erred in denying appellants' motion to dismiss the amended complaint upon the grounds that amended complaint failed to state a claim against appellants; and in denying appellants' motion to strike from Paragraph VII of the amended complaint, upon the ground that the same was immaterial, the following:

> "Notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions,"

(R.41-43, 46-47).

III.

The Court erred in denying appellants' motion to compel appellees to elect as between the two theories advanced in the amended complaint (R.61-64), that is to say, whether they

relied for recovery upon the charge of direct negligence against these appellants, or whether they relied upon the theory of respondeat superior under the Guest Law of Idaho.

IV.

The Court erred in permitting the witness Smullen to testify concerning an accident in Pocatello, Idaho, April 15, 1939 and to answer the following question: "Was Mr. Hair in, or did he become involved in an accident?" to which objection was made by appellants on the ground that the same was "incompetent, irrelevant and immaterial and not within the pleadings * * * prejudicial * * *," (R.222-223), and in permitting Smullen, over the same objections, to relate the circumstances of said accident (R.222-226).

V.

The Court erred in permitting the witness Buskirt to testify to the accident of April 15, 1939 in Pocatello, Idaho, in which Hair was involved, over objection of appellants that the same was "incompetent, irrelevant and immaterial" (R. 231-233).

VI.

The Court erred in admitting the testimony of the witness Sid Close as to an incident touching the driving of a motor vehicle in Dubois, Idaho by Rulon D. Hair, over objection of appellants that the same was immaterial in that no knowledge whatever of said incident came to the attention of appellants, L. R. Donnelly and/or R. J. Reynolds Tobacco Company (R.212). First, the Court sustained the objection and ad-

mitted the testimony only as against Hair, which deprived these appellants of the right of cross-examination; the Court then reversed its ruling and admitted said testimony as to appellants (R.286); then the Court again reversed its ruling (R.287), and then admitted in evidence "Plaintiffs' Exhibit 22" over objection of appellants (R. 286-291).

VII.

The Court erred in admitting in evidence plaintiffs' Exhibit No. 22, (Appendix No. 2), which purported to be a certified copy of the records of the Probate Court of Clark County, Idaho, of a conviction and sentence of *B. R. Hair* of *Soda Springs,* Idaho, on or about July 19, 1939, at Dubois, Idaho, of a misdemeanor, to-wit, driving a motor vehicle on a public highway in a reckless manner, to the offer of which Exhibit, the appellants objected:

* * * *

"Second: Upon the ground that it is incompetent, irrelevant and immaterial under the issues in this case particularly because there is no proof in the record of any kind or character affecting these two defendants showing or tending to show any act or thing which came to their knowledge, or of which they were acquainted or by reasonable diligence could have been acquainted insofar as this incident is concerned; that it is incompetent, irrelevant and immaterial because there has been no competent testimony adduced in this record insofar as these two defendants are concerned tending to show that they had any knowledge of any kind or character touching anything that Hair may have done in Clark County, and particularly of this incident; there is no testimony in this record

against these defendants which has been connected up that would in any sense bind these two defendants in any of the matters concerned with said exhibit, and lastly, we further object on the ground that this exhibit is incompetent, irrelevant and immaterial under any of the issues in this case as against these defendants and that the same is prejudicial." (R.288-289).

"L. R. Donnelly and the Reynolds Tobacco Company further objects to the introduction of plaintiffs' exhibit 22, upon the ground that it does not purpose to effect or have anything to do with Rulon D. Hair or R. D. Hair living at Pocatello, Idaho, and employee of the defendants at that time, but it recites that it is a person known as B. R. Hair of Soda Springs, Idaho, and could not and does not give any notice to anyone interested in the employee of the defendants, one R. D. Hair of Pocatello, Idaho" (R.291).

VIII.

The Court erred in overruling appellants' motion to strike certain evidence adduced by appellees, viz.:

1. Plaintiffs' Exhibit No. 22, being a copy of a criminal docket of the Probate Court of Clark County, Idaho (R.287-290), in that such incident was not shown to have been known to appellants or either of them, and could not, on the theory of being a public record, or otherwise, impute knowledge on the part of appellants, or either of them, of any such incident involving Rulon D. Hair (R. 292-293).

2. All evidence relating to the so-called Myers incident alleged to have occurred in Pocatello, Idaho, about April 15, 1939, wherein Rulon D. Hair was involved, and particularly

the testimony of F. H. Smullen, Ben Buskirt, and L. R. Donnelly on cross-examination, so far as it had reference to the Pocatello incident, upon the following grounds:

(a) That an isolated incident even though known was insufficient to prove a habit of negligence on the part of Rulon D. Hair, and wholly insufficient to prove any negligence on the part of appellants or either of them, growing out of their relationship as employer of Hair;

(b) That the single isolated incident of negligence claimed to have been committed by Rulon D. Hair in Pocatello, Idaho, on April 15, 1939, coming to the knowledge of appellants—employer—with no other act of negligence on the part of Hair coming to the attention of the employer, would not render appellants guilty of negligence in retaining Hair in their employ.

IX.

The Court erred in requiring the witness L. R. Donnelly, on cross-examination "under the Statute," to testify concerning the Myers accident and to answer the following question: "Did you find that a person had been killed in that accident?" (R.194) over appellants' objection as "incompetent, immaterial and irrelevant * * * nothing at all to do with the controversy involved in this case" (R.194), and over the same objections in requiring Donnelly to testify to the details of said accident and the litigation which followed (R. 196-198).

X.

The Court erred in requiring the witness E. A. Darr, on cross-examination to testify concerning the Myers accident

and to answer the followlwing question: "You did know, Mr. Darr, that Rulon D. Hair was involved in an accident with R. J. Reynolds Tobacco Company truck on or about April 11, 1939 in which a man, Myers, was killled (R.251) over appellants' objection "that it is incompetent, immaterial and no sufficient foundation laid, and the evidence of one act would not constitute incompetency" (R.251), and in requiring Darr over the same objections to testify to reports received and the details of said accident and the litigation which followed and permitting to be received in evidence and read to the jury over the same objection Exhibits attached to Darr's deposition and designated "B" (R.255-57), "C" (R.258), "D" (R.258), "E" (R.259-60), "F" (R.260-61), "G" (R.261) being letters and reports sent to Darr.

XI.

The Court erred in admitting in evidence plaintiffs' Exhibit No. 10, being a framed photograph, in color, of the deceased, Avenell Newby, to which appellants objected upon the ground that the same was "immaterial * ** designed to prejudice the jury and no foundation laid for its admission" (R.188).

XII.

The Court erred in rejecting defendants' Exhibit No. 21 to which objection was made by appellees that the same was self-serving, immaterial, incompetent, and sustained by the Court, which exhibit was offered for the purpose of tending to prove Hair was not a careless and incompetent driver, but on the contrary, the information had by appellants was that he was a very careful driver.

XIII.

The Court erred in failing to grant appellants' motion for a directed verdict made upon the following grounds:

1. The insufficiency of the evidence to support any verdict against appellants in that the evidence showed without dispute that at the time of the accident and for about 18 hours theretofore, Rulon D. Hair was not acting within the scope of his employment as an agent of appellants or either of them, nor doing anything in the furtherance of his master's business, but was entirely upon a pleasure party of his own and that at the time of the accident, he was transporting Avenell Newby to her home in Montpelier, Idaho.

2. The evidence showed that Avenell Newby was riding in said automobile as a guest of Rulon D. Hair and that Hair had no authority from appellants or either of them to haul guests in said car but had positive written and oral instructions not to haul guests in said car; that neither of the appellants had knowledge of any violations of said instructions as would constitute a waiver thereof.

3. Hair's re-employment from and after April 15, 1939 was on condition that he would positively obey such instructions and there was no knowledge on the part of the appellants thereafter that he ever disobeyed them prior to September 11, 1942.

4. At the time of the accident, Hair was not guilty of reckless disregard of the rights of Avenell Newby nor violating any of the requirements of the Guest Statute of Idaho providing for the recovery of the guest suffering damage.

5. The insufficiency of the evidence to show that Hair was careless, reckless or an incompetent driver or that he was

habitually negligent or if so that said facts were known to the appellants or either of them.

6. The evidence shows that at the time and place of the accident, Avenell Newby was riding in said car at her request and had joined with Hair in all acts he performed prior to and during the time preceding the accident and was in a position to be as observant of all surrounding conditions just preceding the accident and of all acts on the part of Hair, as was Hair himself, and that she made no protest nor objections regarding the operation of said automobile, but acquiesced in Hair's conduct and the operation thereof and thereby assumed all risks attendant upon said trip and the accident resulting therefrom (R.359-363).

XIV.

The Court erred in denying appellants' motion for judgment notwithstanding verdict and in the alternative for a new trial, made upon the same grounds as the motion for a directed verdict and the insufficiency of the evidence, errors at law occuring at the trial, including the court's rulings on the evidence heretofore complained of in these specifications, and instructions of the Court given to the jury to which exceptions were taken, and the failure to give other instructions requested by the appellants, all of which are set out in the following specifications of error and appear at length in said motion at (R.71-82).

XV.

The evidence is insufficient to justify a verdict and judgment thereon against appellants and is against the law, more particularly as follows:

(a) The evidence fails to show at the time of the accident Rulon D. Hair was acting as an agent, servant or employee of appellants or either of them, but on the contrary, it conclusively shows that he was not acting within the scope of his employment but was engaged entirely with Avenell Newby on a pleasure party of their own.

(b) The evidence is undisputed that at the time of the accident Avenell Newby was a gratuitous guest of Rulon D. Hair being transported by him contrary to positive written or oral instructions from appellants forbidding the hauling of guests and the evidence is insufficient in law to prove a waiver of said instructions.

(c) That the Myers incident and the Dubois incident referred to in the evidence are insufficient as a matter of law to prove Rulon D. Hair as an incompetent or reckless driver and save for the Myers incident, there is no evidence that either of these appellants had any knowledge that Hair had ever been involved in any other accident but, on the contrary, the evidence showed a high degree of competency and skill on the part of Hair in the use of appellants' automobile.

(d) The evidence is conclusive that Avenell Newby was a gratuitous guest of Rulon D. Hair, but fails to show that at the time of the accident Hair was guilty of reckless disregard of her rights or otherwise violated said statute.

(e) The evidence is without dispute that at the time of the accident Avenell Newby was riding with Hair at her request and that the two were engaged in a joint venture in which she assumed all risks incident upon said trip, and that

she was at all times conscious and could observe Hair's conduct, but made no protest but acquiesced therein and she thereby became, and her heirs are now, estopped as a matter of law from asserting liability for damages.

XVI.

The Court erred in giving to the jury that certain instruction as follows:

> "You are instructed, that while some evidence has been admitted as to defendant Rulon D. Hair having permitted other people to ride in his truck at various times, and as to a former accident in which defendant Rulon D. Hair was involved with a similar truck in Pocatello, Idaho, in the Spring of 1939, in which one Myers was involved, and also evidence pertaining to the arrest and plea of guilty of defendant Rulon D. Hair at Dubois, Idaho, in 1939, for an alleged violation of a traffic law, you are instructed that you cannot consider any of said evidence received on either of said incidents as any evidence whatever supporting the charge against defendant Rulon D. Hair, in this action. This evidence was admitted as to defendant R. J. Reynolds Tobacco Company and L. R. Donnelly, as to their responsibility as covered in other instructions," (R.368-369)

to which appellants took exception upon the grounds that neither of appellants could be liable for either of the acts recited in said instruction and in each instance insufficient to constitute any habit of negligence; further, that there was no evidence that either of appellants had any knowledge or information, or could be charged with any, that Rulon D. Hair was involved in the Dubois incident (R.377, 383).

XVII.

The Court erred in giving to the jury that certain instruction as follows:

> "The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person, and in that Statute it is provided that it shall be prima facie lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute, that it shall be prima facie unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities," (R.369)

to which instruction appellants excepted upon the ground that "this would apply to cases of ordinary negligence in which automobiles are involved and that it does not have application in the instant case; or in any case where the guest statute is involved and that the said instruction would tend to confuse and mislead the jury into considering the law applicable to ordinary negligence rather than cases under the statute" (R.378).

XVIII.

The Court erred in giving to the jury that certain instruction as follows:

> "You are instructed that a servant may be presumed prima facie to be acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged injury occurred, it was being used under conditions which normally attended those used in connection with the master's business, (R.369-370)

to which exceptions were taken "upon the ground that such instruction overlooks the fundamental facts in this case and also overlooks the facts that such presumption may be rebutted by evidence indicating or showing that the servant was using said instrumentality for his own purpose or in a way not within the scope of his employment or in the advancement of his master's business" (R.379).

XIX.

The Court erred in giving to the jury that certain instruction as follows:

> "You are instructed that if you should find from the evidence that the said Rulon D. Hair had previously to the 11th day of September 1942, disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the R. J. Reynolds Tobacco Company or any of its authorized agents or if by the use of ordinary diligence and precaution such facts could have been known to the said R. J. Reyn-

> olds Tobacco Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business." (R.370)

to which exceptions were taken "upon the ground that the instruction is too limited as to the matter therein involved, particularly in that such could not be the basis of the law in this case unless it should be broad enough to show that the disregard of said instructions of the Company had become so notorious as to form a habit, and that an occasional disregard, if any existed, could not be regarded as a waiver of said fundamental rule." (R.380).

XX.

The Court erred in giving to the jury that certain instruction as follows:

> "You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenell Newby, then your verdict should be for the plaintiffs if you find for the plaintiffs upon the other issues." (R.370-371)

to which exceptions were taken "particularly because said instruction does not distinguish between the rights of the said

Hair and the rights of the Reynolds Tobacco Company and Donnelly, but advises the jury in effect that if they should find that Avenell Newby was a guest of Hair's then their verdict should be against the defendants." (R.380-381)

XXI.

The Court erred in failing to give to the jury appellants' requested instruction number 5 as follows:

> "You are instructed that a high rate of speed or even excessive speed in the driving of an automobile is not in and of itself reckless disregard of the rights of a guest riding in said car with said driver," (R.384)

Appellants' exception being "for the reason that the rate of speed or even excessive speed in driving an automobile is not in and of itself an element of reckless disregard of the rights of a guest riding in the said car." (R.384)

XXII.

The Court erred in failing to give to the jury appellants' requested instruction number 6 as follows:

> "You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair was forbidden by the R. J. Reynolds Tobacco Company to permit anyone to ride in said car as his guest and if you find this instruction was in full force and effect on the 11th day of September, 1942, but that notwithstanding said instruction he hauled Avenell Newby in his car as a guest, you must then find that he was not acting within the scope of his employment and that any injury, if any, that might have occurred to Avenell Newby as said guest, could not have been charged against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and no judgment could be rendered against these defendants." (R.384)

Appellants' exception being "for the reason that there was evidence introduced from which the jury could conclude that the instruction, from the Company to Rulon D. Hair, not to carry or haul guests in said car was in full force and effect and that a violation thereof would be outside the scope of his employment." (R.384-385).

XXIII.

The Court erred in failing to give to the jury appellants' requested instruction number 7 as follows:

> "You are instructed that there is a presumption that the driver of an automobile is the owner's agent, but this presumption is rebuttable. Thus, if you should find in this case, that the said Rulon D. Hair, at the time of the said accident was using an automobile which was owned by R. J. Reynolds Tobacco Company and L. R. Donnelly, but that the use thereof was not in the furtherance of the business of either of said defendants ,but was being used by the said Rulon D. Hair for his own personal business or pleasure, then and in that event the said R. J. Reynolds Tobacco Company and the said L. R. Donnelly would not be liable for any damage caused by the use of said automobile by the said Rulon D. Hair." (R.385)

Appellants' exception being "particularly because there is evidence in the record clearly indicating and tending to prove that the said Rulon D. Hair was not, at the time of said accident, using said automobile in the furtherance of the business of these defendants or either of them, but on his personal pleasure and outside the scope of his employment," (R.385)

XXIV

The Court erred in failing to give to the jury appellants' requested instruction number 9 as follows:

> "You are further instructed that if you believe from a preponderance of the evidence that on the 11th day of September 1942, Rulon D. Hair was traveling along the highway toward Montpelier, Idaho, with the prime objective of taking Avenell Newby to her home in Montpelier, and that while so driving he was not upon the business of his employer, then and in that event neither the said R. J. Reynolds Tobacco Company nor L. R. Donnelly can be held liable for any damages that might have occurred on said trip even though the said Hair was driving the truck of the said Reynolds Tobacco Company, which may have contained property belonging to said Tobacco Company." (R.386-387)

Appellants' exception being "for the reason that the testimony is that the said Hair was at the time of said accident transporting Avenell Newby to her home in Montpelier, Idaho, and that fact, if it be a fact, that said truck contained products of the Reynolds Tobacco Company would not, under the said testimony, render the other testimony as to the use of said car by said Hair for his personal pleasure and business and not within the employment of the Company, valueless, but that said instruction should have been given in the light of the evidence in this case." (R.387)

XXV.

The Court erred in failing to give to the jury appellants' requested instruction number 12 as follows:

> "You are instructed that if you believe from a pre-

> ponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor and that the said Avenell Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under the influence of such intoxicating liquor, then and in that event you are instructed that the said Avenell Newby assumed the risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances the plaintiffs cannot recover in this case," (R.388)

Appellants' exception being "for the reason that the law of Idaho is to the effect that if a guest participates and joins with the driver of an automobile in imbibing intoxicating liquor, the guest is equally liable with the driver and is contributorily negligent and assumes the risk of riding in said automobile." (R.388).

XXVI.

The Court erred in failing to give to the jury appellants' requested instruction number 14 as follows:

> "You are instructed that a gratuitous guest or his heirs or legal representatives cannot recover for a host's negligent operation of an automobile if, conscious of apparent danger or faced with such conditions and circumstances as would herald danger to a reasonably prudent man, he fails opportunely to protest or acquiesces therein, and in this case, if you believe from the evidence that Avenell Newby, acting as a reasonably prudent person, should have known that Rulon D. Hair was driving said automobile in a reckless disregard of the rights of others, or that he was intoxicated, and nevertheless continued to ride with him under such conditions, or failed to give timely warning

> to him, then you are instructed that her failure to do so would bar a recovery by the plaintiffs, and if you find such circumstances and facts existed, your verdict should be for the defendants," (R.388-389)

Appellants' exception being "for the reason that under the law and the facts in this case, if said Avenell Newby failed to protest in anything which said Hair may have been doing in the driving of said automobile but acquiesced therein, she would have assumed all risk and could not recover in this case." (R.389).

XXVII.

The Court erred in failing to give to the jury appellants' requested instruction number 15 as follows:

> "You are instructed that the plaintiffs have alleged that the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless and incompetent driver. Before you can consider this charge against the said R. J. Reynolds Tobacco Company and L. R. Donnelly, it would be necessary for you to find from a preponderance of the evidence, first, that Rulon D. Hair was commonly and ordinarily a careless, reckless and incompetent driver; and, secondly, that such facts were known to the R. J. Reynolds Tobacco Company and L. R. Donnelly. You are further instructed that one incident of carelessness of recklessness brought to the attention of R. J. Reynolds Tobacco Company and L. R. Donnelly, does not in and of itself prove that the party so engaged was habitually a careless or reckless driver, but that before such a matter can be considered by you it would be necessary for you to find from a preponderance of the evidence that the said Rulon D. Hair had committed a number of such acts

> to such an extent that it was a habit with him and that a reasonably prudent man knowing of them and all of them, would reasonably conclude that he was of such character; and unless you find all of these facts to be sustained by a preponderance of the evidence you are instructed to disregard this allegation of the plaintiff's complaint and you cannot consider it in arriving at a verdict." (R.389-390)

Appellants' exception being "that one or even two acts of recklessness, carelessness or negligence could not be interpreted as forming a habit or negligence and would not render a driver of an automobile as an incompetent driver or habitually reckless and careless." (R.390)

XXVIII.

The Court erred in failing to give to the jury appellants' requested instruction number 18 as follows:

> "You are further instructed that one act of negligence if you find that one was committed, by Rulon D. Hair prior to September 11, 1942, and brought to the attention of the R. J. Reynolds Tobacco Company or L. R. Donnelly such fact would be wholly insufficient to charge Hair's said employers or either of them, with negligence, and you must disregard such testimony." (R.392)

Appellants' exception being "because under the law, it is not possible for the jury to conclude that a driver was incompetent or careless or reckless by reason of having committed one or two previous acts of negligence." (R.392)

XXIX.

The Court erred in failing to give to the jury appellants' requested instruction number 19 as follows:

> "Even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless and incompetent driver, yet if such was not known to R. J. Reynolds Tobacco Company and L. R. Donnelly, they could not, nor either of them be held negligent in employing Rulon D. Hair, or keeping him in their employment." (R.392-393)

Appellants' exception being "for the same reason as assigned to the refusal to give instruction number 18." (R.393)

ARGUMENT

I.

THE AMENDED COMPLAINT IS INADEQUATE MOTIONS DIRECTED AGAINST IT SHOULD HAVE BEEN SUSTAINED

(ERRORS I TO III)

(Motion to Dismiss)

Appellants' motion to dismiss is predicated on the ground that the amended complaint fails to state a claim against appellants or either of them upon which relief can be granted.

Idaho Code Annotated, Sec. 48-901 as amended 1939 Ida. Ses. Laws, Chap. 160, p. 236, known as the Idaho Guest Statute, reads as follows:

> "Liability of Motor Owner to Guest. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of an accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others."

Before amendment the section of the statute contained the words "gross negligence"; by the amendment those words were deleted and the word "intoxication" was inserted. Thusly, by the amendment, negligence ceased to be a basis of recovry by a guest or anyone claiming under or through a guest. The amendment obviously deals with the operator of the vehicle. Only the operator should be responsible to a guest. An employer, unless the operator, ought not be liable. Cases

seemingly to the contrary, involve statutes containing the words "gross negligence." The rule of respondeat superior, applied under the theory of gross negligence, has caused some courts to hold the employer liable where the employee has injured a guest.

Under the Idaho Guest Statute as amended, it would seem that employer cannot be guilty of "intentional injury," "intoxication" or "reckless disregard of the rights of others." Those phrases are peculiarly and particularly applicable to the operator. For that reason the case of Manion v. Waybright, 59 Ida. 643, 86 P 2d 181, decided before the amendment, does not apply.

Under Idaho's Guest Statute no recovery can be had against the driver of the motor vehicle unless the accident shall have been intentional on the part of the driver, or caused by his intoxication or his reckless disregard, etc. There is no allegation in the amended complaint that the accident was caused by an intentional act on the part of Hair, nor by his intoxication. The allegation therein is that Hair "with a reckless disregard of the rights of * * * Avenell Newby, so recklessly drove and operated the said panel truck * * * that the same ran off the said highway, tipped over and inflicted serious injuries upon said Avenell Newby * * * (R.39).

The Supreme Court of Idaho in Ellis vs. Ashton and St. Anthony Power Co. 41 Ida. 106, 238 Pac. 517, discusses the meaning of the term "reckless," saying:

> "In the Century Dictionary the word 'reckless' is defined as meaning 'desperately heedless.' In the New

> Standard Dictionary the term is defined as 'destitute of heed or concern for consequences; especially foolishly heedless of danger, headlong, rash; desperate'. * * * A reckless act, moreover, is always regarded as the equivalent of a wilful one. * * * the terms 'recklessly' and 'wantonly' were regarded as synonymous. * * * it is declared that the word 'reckless' means more than carelessness—it implies wilfulness."

In Dawson vs. Salt Lake Hardware Co. (Ida.) 136 P. (2d) 733, the court ruled that the word "reckless" as used in the Guest Statute meant "without thought or care for consequences." It thus seems that one who exhibits "reckless disregard' manifests a wilful or wanton state of mind, or such conscious indifference as to consequences as to amount to wilful intention.

In Ohio the guest statute contains the words "wilful and wanton misconduct." In the case of Haacke vs. Lease (Ohio) 41 N. E. (2d) 590, decided June 27, 1941, the complaint therein, held insufficient by Ohio's Supreme Court, was similar to appellees amended complaint herein, as shown by the following taken from that decision: "Plaintiff in his amended petition alleges * * * that the defendant was operating said motor vehicle * * * and that while plaintiff was so riding 'the defendant wilfully and wantonly, * * * drove said motor vehicle so as to cause said motor vehicle to leave the highway"; then follows an attempt to show factual circumstances, being the defendant's act in looking away from the highway for one-fourth mile while driving; his failure to stop or slacken his speed while so driving, and his persistence in such conduct for about one-fourth mile; then followed the allegation that as a direct result of such conduct the

vehicle left the highway, turned over and injured the plaintiff. The Court, in ruling that a motion for directed should have been sustained, said:

> "Facts must be pleaded which reveal on their face the element of wantonness, and they must be proved as pleaded. * * *
>
> "To constitute wanton negligence the party doing the act must be conscious of his conduct and must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury."
> * * *
>
> The guest must plead unequivocally that the operator had knowledge of existing conditions, otherwise no liability is fixed."

The Indiana guest statute provides for recovery if the accident shall have been intentional on the part of the owner or operator or caused by his reckless disregard of the rights of others. In Jay vs. Holman (Ind.) 20 N. E. (2d) 656, quoting from an Indiana case previously decided, the court pointed out the instances wherein liability may exist under its guest statute, as follows:

> "First, where the accident resulting in injury was intentionally caused; and, second, where the accident was caused by a reckless disregard of the rights of others, meaning thereby not to relieve from liability where caused when the owner or operator voluntarily does an improper or wrongful act, or, with the knowledge of existing conditions, voluntarily refrains from doing a proper and prudent act, under circumstances when his action, or his failure to act, evinces an entire abandonment of any care, and a heedless indifference to results which may follow, and reck-

lessly takes the chance of an accident happening without intent that any occur."

The wording of appellees' amended complaint to the effect that Hair, with reckless disregard to the rights of Avenell Newby, so recklessly drove and operated the panel truck so that it ran off the highway, thereby inflicting injury to Avenell Newby (R.39), it would seem comes squarely within the reasoning of the cases hereinbefore referred to. There is nothing set forth in the amended complaint from which it can even be remotely inferred that the automobile ran off the highway because of any reckless disregard on the part of Hair, nor that he knew, or had reason to know the surrounding conditions such as to warrant him acting other than as he did. It will be remembered that the evidence shows without dispute that a front tire on the panel truck was shown to have been blown out right after the accident, and Hair testified that he had run into the soft shoulder of the highway in passing a motorist (R.302, which seemlingly caused the tire to be blown (R.307-308). The weather was rainy and the pavement wet, which caused the shoulder to be wet; it was when Hair ran into the soft road shoulder that the blow-out occurred and he tried to control the car and keep it from going off the embankment (R.323).

The foregoing testimony is pointed out just to show that in reality no heedless or reckless disregard was shown; on the contrary, due care and circumspection is thereby illustrated; the proof does not approach negligence. Yet that state of facts is with the purview of the allegations of appellees' amended complaint (Par. VIII, R. 39), and is set forth for the pur-

pose of illustrating appellants' contention that no claim is stated against them by such amended complaint. The factual allegations of injury and that the car ran off the highway and tipped over, standing alone, obviously are not charges upon which liability can be predicated; such might happen without fault of any kind on anyone's part. The remaining allegation that Hair drove "with reckless disregard of the rights" of Avenell Newby, is but a conclusion of law and not a statement of fact. Whether or not the manner of driving would support such legal conclusion would depend entirely upon what Hair did factually; even under the most liberal rules of pleading a cause of action cannot be grounded wholly upon legal conclusions.

The remaining element injected into the amended complaint, namely, that appellants permitted Hair to operate the car, "notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions," is entirely unsupported by a factual allegation that Hair was a reckless and incompetent driver—innuendo without a basic supporting allegation—thus leaving the amended complaint lacking in factual statements sufficient to support a cause of action. The trial judge was aware of the weakness of the amended complaint when he remarked, "I can see that the complaint may have been better if they had also alleged that he was reckless." (R.192)

For the reasons stated appellants contend that the amended

complaint fails to state a claim for recovery against them or either of them.

B. Motion to Strike

The trial court denied appellants motion to strike a portion of Paragraph VII of the amended complaint, reading:

> "notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile, and was in the habit of hauling guests contrary to instructions." (R.43, 46-47)

The principles involved would seem to be simple and fundamental, since the above quoted language has no bearing upon any cause of action attempted to be pleaded by appellees. The amended complaint contains no allegation that Hair was a reckless or incompetent driver; to allege that appellants hired Hair knowing him to be such, begs the position in the absence of the necessary factual allegations upon which the conclusory matter must rest.

The allegation that Hair "was in the habit of hauling guests contrary to instructions" is, of course, anticipatory. There is no allegation touching "instructions" to Hair—no factual allegation upon which to base the anticipatory and conclusory matter.

It is therefore clear that the amended complaint presumed that instructions had been given touching guests, without the necessary factual allegations; also presumed that Hair was a reckless and incompetent driver, without appropriate allegations to support such inference.

C. Motion to Elect

Appellees, by their mended complaint, sought to recover upon two different theories (1) that Hair as an agent of appellants while acting within the scope of his employment caused injury to Avenell Newby by his reckless disregard of her rights while transporting her as a guest in appellants' automobile; and (2) that appellants were liable because they entrusted an automobile to Hair knowing him to be an incompetent driver. Appellants moved to require appellees to elect upon which of said theories they intended to rely for recovery (R.61-62). The Court denied the motion (R.64).

These theories are entirely different. The first attempts to hold appellants upon the theory of respondeat superior under the Idaho Guest Statute, while the second attempts to enforce liability on the ground of simple negligence. A different degree of proof is required in each instance. Attempted proof of the second theory necessarily prejudices appellants under the first theory. The difficulties which arose over the admission of the testimony of Sid Close, hereafter argued, is an illustration of this fact. During the trial, the Court seemed to feel that certain testimony would be binding upon Hair (Sid Close's testimony) and that other testimony would be binding only upon appellants (Exhibit No. 22). The confusion which thus arises and the consequent prejudice therefrom could not be helpful in affording any of the defendants a fair trial. Appellees knew in advance what their proof would be and they certainly could have elected upon which of said theories they intended to predicate their claim and the motion

to elect, it is urged, was properly made and should have been granted.

II.

THE TRIAL COURT ERRED IN ADMITTING AND REFUSING TO STRIKE TESTIMONY OFFERED BY APPELLEES DESIGNED TO SHOW HAIR WAS AN INCOMPETENT DRIVER.

(ERRORS IV to XII)

Over objection of appellants the Court permitted the witnesses Smullen and Buskirt to testify to an accident in which Hair was involved 3½ years prior to the Newby accident; also required Donnelly and Darr to go into details concerning what they had heard about this accident. The questions propounded to these witnesses were objected to by appellants as appears in Errors IV, V, IX and X. The theory of appellees seemingly was that such tended to prove the incompetency of Hair, while appellants contend such was too remote and did not serve such purpose, and the testimony furthermore was immaterial and prejudicial in that at best it was only the accident itself and not the circumstances or details which could be pertinent. The Court also permitted to be introduced the testimony of Sid Close touching a reckless driving charge against Hair in July, 1939. This is set out in Error VI, together with appellants objections. The fact that this testimony was apparently admitted only as against Hair does not cure the error because, so far as Hair was concerned, it was wholly immaterial and it could have no effect except to prejudice appellants. Exhibit 22 was admitted over objections of appellants, all as appears in Error VII. The Court also admit-

ted as evidence a framed photograph of the deceased aimed solely to create sympathy and prejudice. Objection appears in Error XI.

Appellants offered Exhibit 21 which was a duplicate of a letter addressed to Hair in 1940, reciting his freedom from accidents and commending him upon his care as a driver. This offer was denied. Error XII. It tended to rebut any charge of "known" incompetency and was admissible as an office record. In 20 American Jurisprudence, p. 881, Sec. 1943, it is said:

> "The truth-telling habits of such business records make them admissible, irrespective of the unavailability of the witness."

When it became apparent that appellees had no further testimony of offer in an attempt to prove incompetence, appellants moved to strike Exhibit 22 and the testimony of Smullen, Buskirt and Donnelly above referred to and to which appellants had objected. This motion is recited in Error VIII. The Court denied the motion.

In all the foregoing rulings appellants contend the court committed error for the reasons recited in the objections and motion set out in the Specifications.

Further bearing on the motion to strike the testimony touching the Myers incident, attention is called to the fact that before the motion was made, L. R. Donnelly had testified very pointedly to the effect that after this accident Hair was re-employed only after a careful investigation and upon positive assurances given by Mr. Hair that he would not in the

future haul any guests in the car. On this point he testified as follows:

> "Q. Was there any instructions given to Mr. Hair in respect to that?
>
> A. Yes sir, very emphatic.
>
> Q. What were they?
>
> A. We have a car agreement that Mr. Hair signed. Before an employee is allowed to operate a car, or an employee is hired he is gone into very thoroughly, as to whether he is competent to drive.
>
> Q. What did you find with respect to Hair?
>
> A. I found that he was a competent driver.
>
> * * *
>
> A. After he signed this car agreement, I explained it in detail, and after the accident I sat him down in the hotel room, * * * and I explained to him * * that there would be no more passengers in that car, and if it ever was found out that he carried another passenger he would be discharged immediately." (R. 204-205)

Donnelly had also testified that between the dates of the Myers accident and the Newby accident no information whatever came to him of any dereliction on Hair's part, but that much information came proving Hair to be a very competent driver with a very good record, and that he had conscientiously obeyed all rules of the Company (R.207).

Mr. Darr had also testified that no information whatever indicating Hair was in anywise incompetent as a driver, but

that such information as came to the Company was the reverse (R.280). At R. 281 he testified as follows:

> "Q. What has Mr. Hair's record been with the company as to being a careful and competent driver, Mr. Darr?
>
> A. He has a record since April, 1939, up to September 11, 1942, of having had no accident in connection with the Company car, and has received letters of commendation along with merchandise awards in April, 1940, April, 1941, and April, 1942, which he won as a result of having maintained a clear record." (R.280-281)

The evidence quoted above is undisputed.

When the motion to strike was made, therefore, it was apparent that there was only one incident which occurred and which came to the knowledge of appellants. The question then was: Is one accident 3½ years before sufficient to permit a jury to determine the competency of the driver? A man perfectly competent may sometimes be negligent, but such does not prove incompetence.

In the case of Olsen vs. Northern Pacific Lumber Co., 106 Fed. 298, it is stated:

> "A master cannot be charged with knowledge of the negligent character of a fellow servant of the injured employee by evidence that five years before that on three other occasions during the five years persons working with him had come near being injured."

In Guedon vs. Rooney, (Ore.) 87 (2d) 209, 218, it is stated:

> (Quoting from Davis vs. Shaw, 1932 La. App. 142 So. 301, 305) "To hold the owner of an automobile liable to a third person for damages caused by one to whom his car had been loaned, 'merely on the ground that the owner had knowledge that such user had previously had an accident while driving an automobile * * * would unjustly deprive both the owner and the non-owner user of such car, of pleasure, recreation, and the benefits to which every citizen of this country is accustomed, if not in a sense entitled."

The Oregon court further pointed out "a man perfectly competent * * * may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence:" also, "that very few automobile drivers can be proven to have neither had an accident nor to have exceeded the speed limit in driving on public highways.

See also Pittsburgh Rys. Co. vs. Thomas, 174 Fed. 591, wherein the following jury instruction was approved:

> "In order that prior specific acts of negligence by a fellow servant should be sufficient to establish the master's negligence in retaining the servant in his employ, the acts must be the result of incompetence, or of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position."

The Court also permitted testimony, over objection of appellants, of the arrest, during July, 1939, of a man named B. R. Hair at Dubois, Idaho, without any showing at all that appellants had any knowledge at that time or subsequently, that such incident involved Rulon D. Hair (R. 214, 286-291). The Court allowed the testimony of the witness Sid

Close to be stricken relating to the Dubois incident (R.286-287), and then admitted in evidence Plaintiffs' Exhibit No. 22 over objection of appellants (R.286-291). Such exhibit purported to be a certified copy of a criminal record of the Probate Court of Clark County, Idaho, showing that on or about July 19, 1939, one B. R. Hair drove a motor vehicle in a reckless manner on the public highway.

It is indeed difficult to discern upon what theory the Court allowed the admission of Plaintiffs' Exhibit No. 22. Obviously such a criminal record of a misdemeanor charge wherein the sentence imposed was $50.00, against a man named in the record as B. R. Hair, Soda Springs, Idaho, would not and could not impart any notice to appellants or either of them that this meant Rulon D. Hair at that time living in Pocatello, Idaho. There is no similarity at all between the Christian initials or names, "Rulon D." and "B. R." Furthermore, the record is clear and undisputed in any way, that neither of appellants ever had any notice or knowledge of the Dubois incident.

The record likewise is clear and uncontroverted that at no time from and after April, 1939, until the accident of September, 1942, did appellants or either of them have any notice or knowledge whatsoever that Rulon D. Hair had ever been involved in any incident of any kind or character, whereby his record as a thoroughly competent driver during that three and one-half years was, or could be in anywise questioned. Nor did they, or either of them have any knowledge of any incident where he may have hauled a guest in the Company's panel truck, other than an employee of the Company.

It thus becomes clear that the Court committed error in permitting appellees to introduce the purported showings having for their purpose the proving of a record of driving incompetency and the hauling of guests on the part of Rulon D. Hair. Obviously such attempted showings utterly failed in the purpose of tending to prove negligence on the part of appellants in employing or reemploying Hair after the happening of the Myers, Pocatello, incident of April, 1939. The Court likewise erred in failing to strike any such evidence adduced by appellees.

III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY AND THE JUDGMENT RENDERED THEREON. THE COURT ERRED IN DENYING APPELLANTS MOTION FOR A DIRECTED VERDICT, AND THEIR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

(Errors XIII, XIV, and XV)

The theory of appellees appears to be that appellants are liable upon two theories; first, that Hair was an agent and employee of appellants, acting within the scope of his employment at the time of the injury to Mrs. Newby and secondly, that Hair was a careless and incompetent driver and that such fact was known to appellants and they were, therefore, negligent in hiring him and entrusting the panel truck in his care. Both charges were inadequately and, we contend, improperly pleaded and evidence against appellants should not have been admitted thereunder. However, if we assume, for purposes of

argument only, that the pleading is sufficient, the evidence adduced and the law controlling will show that appellees failed to sustain the burden of proof so as to entitle the case to be considered by the jury and that the motion for a directed verdict, or in any event the motion for judgment notwithstanding the verdict, should have been sustained. Appellants will argue these points in the order in which they have been stated.

1. Hair was outside the scope of his agency in (a) hauling a guest contrary to instructions and (b) in his associations with Mrs. Newby.

A. The panel truck was owned by the R. J. Reynolds Tobacco Company, and Rulon D. Hair was in its employ as a salesman of its products. When the automobile was entrusted to his care, it was pursuant to a strict written agreement which contained the following language:

> "I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company business as directed by my Division Manager. I understand that under no consideration am I to permit anyone, save and except an employee of R. J. Reynolds Tobacco Company, to ride with me in said car." (R. 206 Def. Ex. 14)

Previous to his receipt of this particular automobile, Hair had used other trucks with the same understanding. It was a distinct and definite policy of the Company with which he was well conversant when he was first employed in 1937. He testified that he understood such instructions and was "not to carry passengers at any time outside of the company employees, and not to use the car for personal business whatever."

(R.311). He would occasionally receive bulletins from the company explaining the care he should exercise, which bulletins were formal and sent to all employees and sometimes requested a reply. To one of these bulletins Hair made reply in writing and among other things said: "I shall never carry any passengers outside of my Division Manager." Def. Ex. 23 (R.313).

After working hours on September 10, 1942, Hair yielded to the suggestion of Avenell Newby and took her as his guest to a night club. Here they ate and drank and danced until the club closed about 2:00 or 3:00 o'clock A. M. on the morning of September 11 (R.297). They then drove back to Montpelier and from thence to Soda Springs, Idaho, to visit another night club called The Oasis Club. This club was closed and they thereupon went to the Enders Hotel in Soda Springs where they remained until about noon of September 11 (R. 320). They went then to the Oasis Club where they ate and drank and danced until about 2:30 P. M. (R.321). It was then agreed that Hair should take Mrs. Newby back to her home in Montpelier and it was on the return trip that the car upset and she was fatally injured. They had been together on a party of their own for approximately 18 hours (R.316) and during that time Hair was doing no business whatever for the company. Upon his cross-examination, he was asked and answered as follows:

> "Q. Now, during that time that you were with her you were not doing any business for the company?
>
> A. None whatever.

Q. That entire time of approximately eighteen hours was a party of your own?

A. Yes sir, it was.

Q. Your trip over to Grace was to tell a Salesman to tell your wife that you would be late getting home that night.

A. Yes sir.

Q. And when you left Grace you went back to Montpelier?

A. Yes sir.

Q. And it was on the way back you had the accident?

A. Yes sir.

Q. Your first object in going back to Montpelier was to take Mrs. Newby home?

A. That would be my first objective I guess.

Q. That is what you intended to do?

A. Yes sir."

This testimony is without contradiction and is in many respects corroborated. The presumption that Hair was on his master's business because he had in his possession his master's car, was entirely overcome and destroyed and under the authorities hereinafter recited it then became a matter for the Court to determine that he was not engaged in his employer's business.

There are two positions definitely sustained by authority supporting appellants on this point in this case, namely, that when Hair disobeyed instructions and took Avenell Newby as a guest in this car, he departed from the scope of his employment and his employer was not liable for injuries that may have thereafter been sustained by her, and his subsequent conduct was such as to show definitely that he had completely departed from his master's business.

In the case of Chajnacki vs. Dougherty, (Mich.) 236 N. W. 789, on page 789 the Michigan Court said:

> "It is well settled that a master is not liable for the negligent acts of his servant unless at the time the servant is acting within the scope of his employment or within his actual authority. In inviting the plaintiff to ride, the driver of the truck was not acting within the scope of his employment. His act was not only unauthorized but was contrary to the express instructions of his employer."

In the case of Albers vs. Shell Co., (Cal.) 286 Pac. 752, the opinion of the Court is digested in syllabus No. 2 as follows:

> "Driver of oil truck held not in course of employment in carrying passenger against employer's rules while making delivery."

On page 757 the California Court said:

> "The excerpt which we have taken from this case concerning the course of employment of the driver of the automobile needs no elaboration to show that Winfrid Albers was not injured by the defendant Morton while Morton was in the course of his employment. Morton was employed to drive the truck

> down the highway leading to the bridge where the accident occurred, to deliver gasoline and oil, and was not employed to transport either a guest, a licensee, or a trespasser."

In the case of Hartigan vs. Public Ledger, (Pa.) 140 Atl. 524, the opinion of the Court is digested in syllabus No. 2 as follows:

> "Employer is not liable for injury to boy falling off delivery truck on which he was riding with employee's consent, where the employee had permitted the boy to ride against express orders not to permit anyone to ride without permission of employee's superiors."

On page 525 of 140 Atl., the Pennsylvania Court said:

> "Even if negligence had been proved there could be no recovery. In Perrin vs. Glassport Lumber Co., 276 Pa. 8, 119 Atl. 719, the driver had instructions not to allow others to ride on the truck. We said in that case 'though the plaintiff was on the car by invitation or permission of the employee, unless consent was authorized, properly or impliedly, the employer is not to be held liable, except for injury resulting from some willful act. He had no implied authority to permit boys to ride on his truck and acted beyond the scope of his employment when he did so. The master, short of wantonness, did not owe him the duty of safe carriage or to see that he was safely alighted.'"

So it is in the case at bar. Appellants certainly did not owe Avenell Newby the duty of safe carriage when she became Hair's guest in an escapade which was a complete departure from Hair's employment.

Additional cases supporting the foregoing rule are:

Psota vs. Long Island Ry. Co. (N.Y.), 159 N. E. 180;

Jewell Tea Co. vs. Sklivis (Ala.), 165 So. 824;

Welch vs. O'Leary (Mass.), 191 N. E. 377;

Foley vs. John H. Bates, Inc. (Mass.), 4 N. E. (2d) 349;

Cula vs. Turmelie, 5 N.Y.S. (2d) 811.

Appellees recognized the foregoing rule of law in their pleading and in certain evidence which they offered in this case. In paragraph XVII of the amended complaint, they attempted to allege that appellants knew Hair "was in the habit of hauling guests contrary to instruction" (R.39), and they introduced scattered bits of testimony in attempt to show an infraction of this rule by Hair to which we will presently refer. This rule is inferentially admitted to be correct by the Idaho Supreme Court in the case of Manion vs. Waybright, 59 Ida. 643, 86 Pac. (2d) 181, wherein the Court's opinion is expressed in syllabus No. 7 as follows:

> "In action for death of guest who was riding in defendant's automobile driven by defendant's employee, evidence supported jury's finding that violation of rule forbidding defendant's drivers from carrying passengers was so common and notorious as to have been abrogated."

In the case at bar, there is no common or notorious violation of this rule. Except for the one instance of the Myers accident which occurred 3½ years before, neither of appellants had any knowledge or information that Hair ever carried a

guest in his car (R.207, 278-279). Hair had worked for the company about five years immediately prior the Newby accident and admitted that during such time he violated this rule "four or five times" (R.329). Most of these violations occurred in transporting his wife. Aside from the Myers incident, being the only one known to appellants where anyone other than an employee of the company had been with Hair in the car, the entire testimony on this point is limited to the above statement. It is not possible for one to conclude that such circumstances constituted such violation of the rule as to be common and notorious or such that one could reasonably conclude that the master knew of it. Furthermore it is noted that there is no evidence of violation of this rule, with the panel truck involved in the accident, until the Montpelier incident. It is, therefore, most earnestly urged that the evidence is entirely insufficient in law to prove a waiver of the rule and therefore such rule must stand as a controlling factor in this case.

B. There are other facts conclusively proving that Hair was not acting within the scope of his employment at the time of the accident nor for 18 hours theretofore. These facts have heretofore been enumerated. He was definitely out on a party of his own. There isn't a thing in the testimony from which one could conclude that he was furthering his master's business. The fact that he had his master's car while thus violating his master's instructions, might be argued as raising a presumption in the first instance that he was on his master's business, but that presumption was definitely destroyed by the evidence produced and above referred to, and the question then became one of law for the Court to determine and not for the jury.

The Idaho Supreme Court in the case of Willi vs. Schaefer Hitchcock Co., 53 Ida. 367, 371, 25 Pac. (2d) 167, said:

> "The fact of ownership alone, regardless of the presence or absence of the owner in the car at the time of the accident, establishes a prima facie case against the owner, for the reason that the presumption arises that the driver is the agent of the owner. * * *
>
> "It is equally well settled that, where the evidence offered to establish facts which would rebut this presumption * * * are undisputed and uncontradicted, it becomes properly a question for the court."

In the case of Magee vs. Hargrove Motor Co., 50 Ida. 442, 296 Pac. 774, the Idaho Supreme Court affirmed the trial Court in the granting of a non-suit in favor of the owner of an automobile whose employee was using the automobile on a pleasure trip of his own. The Court, on pages 446 to 448, said:

> "Generally speaking, the owner of an automobile can be held responsible for its negligent operation by another only when, at the time of the accident, the relationship of principal and agent or of master and servant existed between the owner and the operator, and the agent or servant was at that time acting in furtherance of the owner's business. (Annotations, 42 A.L.R. 899; 22 A.L.R. 1397; 17 A.L.R. 621; Baldwin vs. Singer Sewing Mach. Co., 49 Ida. 231, 287 Pac. 944.) Thus, if it be shown that the person driving the car was at the time of the accident an independent contractor, or an agent or servant of the owner but using the car for his own business or pleasure, the owner is not subjected to liability. (22 A.L.R. 1400; 2 Blashfield's Cyclopedia of Automobile Law, p. 1320, sec. 5, p. 1391, sec. 23, p. 1419, sec. 32; 17 A.L.R. 621 et seq.; Potchasky vs. Marshall, 211 App.

Div. 236, 207 N.Y. Supp. 562; Stauffer vs. Schilpin, 167 Minn. 301, 208 N.W. 1004; Barton vs. Studebaker Corp., 46 Cal. App. 707, 189 Pac. 1025; Premier Motor Mfg. Co. vs. Tilford, 61 Ind. App. 164, 111 N.E. 645; Goodrich vs. Musgrave Fence & Auto Co., 154 Iowa, 637, 135 N. W. 58.)

* * *

"If the view be taken that the driver of the car in the instant case was an agent or servant of the defendant company for whose acts the company might be answerable, it is clearly shown that at the time of the accident he was in nowise engaged in furtherance of the master's business but was using the car on a purely pleasure trip. The day was Sunday a hunting trip was suggested and Malicote agreed to furnish the car. The party set out with guns and started out of town in the direction they had gone other times to shoot doves. When they met the deceased he was told the nature of the outing and decided to participate in the fun. Not a word or intimation about the sale of any car, but positive and convincing evidence of a party entirely pleasure-bent.

"Any presumption that might attach that the driver was an agent or servant of the owner of the car is overcome by plaintiff's own evidence. (Potchasky vs. Marshall, supra.) Such an inference does not require that every case shall go to the jury, where the undisputed and uncontroverted evidence establishes the facts so conclusively that the inference is overcome. (Curry vs. Bickley, 196 Iowa, 827, 195 N.W. 617.) And such presumption may be rebutted and overcome by evidence adduced during the trial by the testimony of any of the parties to the suit. (International Co. vs. Clark, 147 Md. 34, 127 Atl. 647.) * * *

"The facts brought out by the plaintiff in this case clearly show that the driver of the car was not an agent or servant of the defendant company acting within the scope of his employment at the time of

> the accident, and it was the duty of the court to declare the one reasonable inference from the facts, as a matter of law, and to act favorably upon the motion for nonsuit for the failure of plaintiff to prove a sufficient case for the jury."

In the case of Baldwin vs. Singer Sewing Mach. Co., 49 Ida. 231, 287 Pac. 944, it was held as a matter of law that one employed to sell sewing machines was acting entirely on his own behalf and was not acting within the scope of his employment, where, after a business trip outside of the city, he returned, parked his car, went to the company's office, and, finding no one there, went to a cafe for supper, did several errands, and was on his way home when his car struck a pedestrian. Beginning on page 237 the Court said:

> "* * * A servant may undoubtedly step aside from his employment and thereafter by returning to it subject his master to liability for ensuing negligence. But there must be some time when the servant's active employment ceases. In this instance, Anderson had returned in the evening to Boise. He parked his car and went to the company's office because, as he said, he supposed there was somebody there and he would 'call in.' Finding none of the office force there, he evidently considered the day's work done and busied himself no further about the company's business whatever. Supper at the cafe, reading the evening paper 'thoroughly,' going several blocks to the postoffice and the plant of the 'Capital News' did not consume any time or postpone any duty reserved or due the company. The mere betaking of himself and his own property home could not have served to restore him to the company's employment. After reaching Boise, had he continued homeward, it might be said that he was concluding a trip made in his employer's business, but he terminated his trip at his own option when he went

> to the company's office, choosing to go home when in the fullness of time it pleased him. It was none of the company's business whether he went home or stayed downtown, 'negotiating the talkies and noodle joints until the wee sma' hours. Had he done so, no such belated return to an awaiting mattress could be said to have been undertaken in his employer's business. Under the admitted facts, it must be held as a matter of law that defendant Anderson at the time of the collision was acting in behalf of himself and none other. Defendant company's motion for nonsuit should have been sustained."

This Court has announced this rule in the case of Department of Water and Power vs. Anderson, 95 Fed. (2d) 577, wherein it held that the owner of the automobile was not liable under the doctrine of respondeat superior for the negligent conduct of the servant who was driving the car, because the servant was not within the scope of his employment at the time of the accident. On page 583, the Court said:

> "That general rule is applicable to cases where the servant is operating an automobile. As a congener to this rule, it is generally held that the master is not liable for injury or damage resulting from the negligent operation of his car by his servant, while the latter is using it for his own purposes without the owner's permission or consent. Annotations: 22 A.L.R. 1397; 45 A.L.R. 477, 478; 68 A.L.R. 1051, 1052; 80 A.L.R. 725, 726; 5 Blashfield, Cyclopedia of Automobile Law and Practice, Permanent Edition, 157, Sec. 3023. The same rule applies although the master has consented to the use of the automobile by the servant. Annotations: 22 A.L.R. 1397, 1400; 45 A.L.R. 477, 480; 68 A.L.R. 1051, 1053; 80 A.L.R. 725, 727."

In Caldwell vs. Miller (Cal.), 141 Pac. (2d) 745, the

principle of law here under consideration is aptly expressed in the syllabus as follows:

> "Where owner and driver of automobile accompanied by girls traveled in search of amusement, driver was not acting as owner's 'agent' so as to render owner liable for girl's injuries resulting from accident caused by driver."

In White vs. Firestone Tire and Rubber Co., 90 Fed. (2d) 637, the Fourth Circuit considered a case where an employee for the company was entrusted with an automobile to be used in his business as a salesman. The automobile had printed the word "Firestone" on each door. The salesman was employed upon a salary and his duty was to call upon agents and dealers who handled Firestone products and to take orders and make suggestions as to their stock and solicitation. The car was to be used only for Company purposes. On Friday, October 16, 1931, the salesman took the Company car and transported several of his friends to a football game. One of the members of the party was named J. C. Gillis, who owned a chain of filling stations. Prior to reaching the football game, they stopped and did some drinking and took a bottle or two to the game. After the game, the plaintiff, while driving along the highway and returning home, collided with another automobile and as the result of the accident, the drivers of both cars were killed and the plaintiff who was a passenger in the other car was injured. She brought suit against Firestone Tire & Rubber Co. upon the theory that its agent, while acting within the scope of his employment, negligently caused the injury. The trial court granted defendant's motion for a directed verdict

and the Fourth Circuit Court affirmed the ruling. On page 639, the court said:

> "We are of the opinion that the evidence does not support any of these theories. On the contrary, the Firestone Company was clearly entitled to a directed verdict. Before a master is responsible for the torts of his servant, the servant must not only be acting in the course of his employment, or within the scope of his authority, but must be actually engaged in his employer's business at the time of the injury. P. F. Collier & Son Distributing Corporation vs. Drinkwater C.C.A. 4th) 81 F. (2d) 200, 204; Martin vs. Greensboro-Fayetteville Bus Line, 197 N.C. 720, 150 S.E. 501; 3 C.J.S., Agency, 187. The general rule is well established. The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work, or that of some other, the master is not answerable for his negligence in the performance of it. Standard Oil Co. vs. Anderson, 212 U.S. 215, 221, 29 S.Ct. 252, 254, 53 L.Ed. 480. Elkhorn Piney Coal M. Co. vs. Hazelett (C.C.A. 6th) 62 F. (2d) 137, 138.
>
> "There is no evidence that Garrett attended to any business of the Firestone Company either in Florence or en route, or that the trip was to any degree a part of his employment. On the contrary, the undisputed evidence shows that the trip was arranged for the sole purpose of attending the football game. There is not a scintilla of evidence to show that Garrett left his territory for the purpose of taking another salesman home. The undisputed evidence shows that Gillis, the customer, actually promoted the party, furnished the liquor which was taken on the trip, and took with him as a member of the party, his guest Scott, who was a stranger to Garrett. Nothing was done on the trip by Garrett in the performance of his master's work, in whole or in part, directly or indirectly. This is not a case where, in the course of a continuing relation,

> both business and private ends have been coincidently served, but is a 'departure so manifest as to constitute a complete abandonment of duty, exempting the master from liability until duty is resumed.' Notes, 17 A.L.R. 621; 29 A.L.R., 470. Peabody vs. Marlboro Implement Co., 63 App. D.C. 288, 72 F. (2d) 81."

In the case of Allen vs. Ross, (Ark.), 138 S.W. (2d) 409, the court held that a Tobacco Company salesman who was driving up and down the road in search for a woman companion who had gone with him on a pleasure trip in Tobacco Company's truck which was loaded with Tobacco Company's products, was not then acting "in the scope of employment," notwithstanding the salesman had made a collection for the Company and the Tobacco Company was not liable for injuries resulting from the negligent operation of the truck.

It may be contended by appellees that R. J. Reynolds Tobacco Company's sign was was printed on the panel doors of the truck driven by Hair and that it contained some products manufactured by the Company. This makes absolutely no difference in determining whether or not the driver was acting within the scope of his employment. In the two preceding cases, these facts appear. Nevertheless, the court in each instance held the owner of the truck was not liable.

In the case of Saltas vs. Affleck (Utah), 102 Pac. (2d) 493, a driver of a grocery delivery truck owned by the defendant, without permission, made his last delivery on the noon trip after picking up two girls whom he had promised to give a ride to the business section of the city. On the trip he became involved in a collision in which a boy was killed.

The Utah Court held that the employee's action in picking up the girls and transporting them, was not a mere deviation but was a departure from the course of employment and the employer's responsibility for employee's acts had ceased as a matter of law.

In the case of Loucks vs. R. J. Reynolds Tobacco Co., 188 Minn. 182, 246 N. W. 893, a salesman whose duty included the posting of advertising signs, was furnished by the company with a car for use on its business only, being forbidden to give rides in the car to persons other than to employees of the Company, and was given positive instructions to do certain work in a specified way on a Saturday; but the salesman started out Friday evening to drive the car to a lake in order to go fishing over the weekend, carrying as passengers his brother and brother-in-law. An accident happened on the way. A suit was instituted for the injury against the Tobacco Company. It was held that the employee was not acting within the scope of his employment, although he testified that he planned to post signs on trees, which covered counties outside of his territory. On page 896 the court said:

> "We are of the opinion that when Begley took appellant's car on the trip from St. Paul to Prior Lake, he was not acting as the agent and employee of appellant within the scope and course of his employment, but, on the contrary, that he was a wrong-doer, and appellant was not liable for his acts."

In the case of Hunter vs. First State Bank, 181 Ark. 907, 28 S. W. (2d) 712, the court said:

> "The test of the owner's liability for the negligence of his employee in injuring the property or

> person of three persons while driving the farmer's automobile, in the nature of its use at the time of the accident—whether or not it is being used in the transaction of business of owner of the automobile. The very basis of the rule of respondeat superior as applied to automobile accidents as well as to other cases, is that the driver of the car is acting for the owner and not for himself personally, at the time of the accident. When the servant steps outside of the master's business and enters upon the performance of some individual purpose of his own, he ceases to act as a servant of the owner, and the latter's responsibility for his acts terminates."

It would be difficult to find a situation where an employee was more definitely on some individual purpose of his own than was Hair at the time of this accident. That he was definitely outside the scope of his employment seems conclusively proved.

There are numerous cases to the same effect as those above cited. Some of them are:

McCammon vs. Edmonds (Cal. App.), 299 Pac. 551;

Reddy Wildhauer-Moffett Co. vs. Spiney (Ga. App.) 185 S. E. 147;

Slinkard vs. National Machine & Tool Co. (Mich.) 265 N. W. 494;

McIntee vs. Baker, 268 N. W. 661;

Ewer vs. Cappe (Minn.) 271 N. W. 101;

Cain vs. Marquez (Cal.) 88 P. (2d) 200;

Usher vs. Stafford (Ia.) 288 N. W. 432;

Holder vs. Haynes (S.C.) 7 S. E. (2d) 833;

Nichols vs. G. L. Hight Motor Co. (Ga. App.) 10 S. E. (2d) 439;

Keen vs. Clarkson (Ariz.) 108 P. (2d) 575;
Lombardi vs. Silver (Ohio App.) 32 N. E. (2d) 558;

Cunningham vs. Union Chevrolet Co. (Tenn.) 148 S. W. (2d) 633;

Montgomery vs. Hutchins (C.C.A. Cal.) 118 F. (2d) 661;

Wilson vs. Farnsworth (L. App.) 4 So. (2d) 247;

Brand vs. Vinet (L. App.) 5 So. (2d) 200;

A. S. Abell Co. vs. Sopher (Md.) 22 A. (2d) 462;

Riddle vs. Whisnant (N.C.) 16 S. E. (2d) 698;

Bayless vs. Mull (Cal.) 122 P. (2d) 608;

Fooks vs. Williams (Ark.) 168 S. W. (2d) 193;

2. Hair Was Not An Incompetent Driver

In the case at bar, appellees alleged in their amended complaint that Rulon D. Hair had permission and authority from appellants to use and operate said panel truck upon the public highways of the State of Idaho, notwithstanding that at all of said times they "knew Rulon D. Hair was a careless, reckless and incompetent driver of an automobile." There is no allegation that he was an incompetent driver, except by

the innuendo aforesaid. Upon this point the court permitted the introduction of evidence touching an accident in which Hair was involved n Pocatello, Idaho, April 15, 1939—approximately 3½ years before the Newby accident. The Court also permitted to be introduced in evidence plaintiffs' Exhibit No. 22 heretofore referred to, being a judgment docket of the Probate Court of Clark County, Idaho, reciting that one "B. R. Hair of Soda Springs, Idaho, on or about the 19th day of July, 1939" was convicted of driving a motor vehicle on the public highway in a reckless manner. While the appellants knew of the Myers accident, neither of them knew of the Dubois incident, and we submit that such record could not possibly have imparted information. We then have to consider this one question: Is one accident, which happened 3½ years before the accident complained of, in and of itself sufficient to establish the status of a driver as reckless and negligent such as to impose liability upon one who might thereafter employ him? In considering this point, it is to be borne in mind that the evidence is very clear that he had a perfect driving record between these two dates (R. 207, 271, 280-281, 285) and was given an award by the company as evidence of such fact. Under this state of facts, appellants contend that there was no adequate proof upon which the case should have been submitted to the jury and none upon which the jury could find that Hair was an incompetent driver or that the company had such information.

Almost all of the authorities upon this phase invariably deal with drivers who are addicted to drunkenness, afflicted with some mental or physical disorder, or are of such tender

years as to be calculated to appraise an employer of their status. None of such facts were alleged or attempted to be proved in the instant case.

In the case of Pittsburgh Rwys. Co. vs. Thomas, 174 Fed. 591, the Fifth Circuit Court of Appeals draws a distinction between negligence and incompetency. An employer would not be liable simply because the employee had been negligent on previous occasions unless such negligence tended to prove incompetency. On page 595 the Fifth Circuit Court said:

> "A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must be either shown that the so-called negligent acts were the result of incompetence, or were of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position, for unfittness, as well as incompetency, is a disqualification for employment."

In Guedon vs. Rooney, 87 (2d) 209, on page 218, the court said:

> "In cases in which it is sought to hold the owner of an automobile liable on the theory that his negligence in lending a car to an incompetent driver was in fact the cause of injury to the plaintiff, the better rule is to require such incompetence of the driver to be shown by specific acts of carelessness and recklessness committed by him. The car owner's knowledge of the driver's incompetence may be shown either by evidence that he in fact knew of such acts or by evidence tending to show that the driver's incompetence was generally known in the community. In this connection it must be borne in mind, as stated in the case of Pittsburgh Rys. Co. vs. Thomas, supra, that 'a

> man perfectly competent * * * may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must be either shown that the so-called negligent acts were the result of incompetence, or were of such a character and so constantly committed as to constitute a habit of negligence.' (174 F. 595). And in Davis vs. Shaw, 1932, La. App., 142 So. 301, 305, it was pointed out that to hold the owner of an automobile liable to a third person for damages caused by one to whom his car had been loaned, 'merely on the ground that the owner had knowledge that such user had previously had an accident while driving an automobile or had on some previous occasion, been vaguely and generally accused of speeding and recklessness, would unjustly deprive both the owner and the non-owner user of such car, of pleasure, recreation, and the benefits to which every citizen of this country is accustomed, if not in a sense entitled.' The court in the latter case further noted that very few automobile drivers 'can be proven to have neither had an accident' nor to have exceeded the speed limit in driving on public highways."

In the case of Olsen vs. Northern Pacific Lumber Co., 106 Fed. 298, this point is further discussed and the opinion of the Court is digested in syllabus No. 4 as follows:

> "A master cannot be charged with knowledge of the negligent character of a fellow-servant of the injured employee by evidence that five years before that on three other occasions during the five years persons working with him had come near being injured."

The appellees at the trial of this case relied upon Department of Water and Power vs. Anderson, 95 Fed. (2d) 577, to support their position that recovery could be sustained

upon the allegation that Hair was a careless, reckless and incompetent driver. It is contended this case is not in point. It is entirely different on facts. In the Anderson case the driver was charged with the excessive use of intoxicating liquor which caused his alleged incompetence and that such was known to his employer. Evidence was introduced that Nicoll, the driver, "was well known for drunkenness' 'that he had been frequently seen drinking whiskey at roadhouses and that his foreman knew that he was frequently drunk. It was on this evidence that the driver's status of incompetence was determined—not because he had one or two prior accidents. There is no testimony in this record that Hair was accustomed to drinking. For a period of over three years, between said accidents, he had a spotless record. There is not a scintilla of evidence known nor which could have been known to appellants or either of them between these two accidents which could have given any suggestion that Hair was an incompetent driver. On the contrary, everything was the reverse. The question, therefore, is: Will an automobile accident definitely stamp the driver involved with incompetency and make employment of him thereafter dangerous for an employer, thus forever limiting a drivers right to make a living? We think the statement of the question suggests clearly its answer.

It is most earnestly contended that as matter of law, the evidence is wholly insufficient on either theory to sustain the verdict of the jury, and the trial court should have granted a directed verdict.

3. Assumed Risks and Contributory Negligence of Guest Precluded Recovery.

Appellants further urge that the evidence is wholly insufficient to support a verdict in favor of a guest. Appellees have no greater rights than Avenell Newby would have had, had she been not killed but only injured. See Northern Pacific Railroad Co. vs. Adams, 192 U. S. 440, 24 Sup. Ct. 408, 48 Law Ed. 513. Avenell Newby was a guest of Rulon D. Hair at the time of the accident as that term is defined in the Idaho Guest Statute. Her rights are limited by the terms of this Statute. She could not recover on the theory of simple negligence, but only if the evidence disclosed that the accident was intentional on the part of the driver or caused by his intoxication or reckless disregard for her rights. The complaint does not charge that the act was intentional or that the driver was intoxicated. Appellee's theory of reckless disregard seems to be predicated upon speed. McGuire testified that Hair passed him on the highway about 8 or 10 miles from the scene of the accident traveling around 60 miles per hour (R.99). Hair testified that he was driving about 35 miles per hour (R.301). Fast driving is not in and of itself reckless disregard nor willful wantonness.

Lutfgy vs. Lockhart, Ariz., 295 Pac. 975.

The only other evidence relied upon by appellees showing reckless disregard is the distance the car traveled before stopping and its markings on the highway. These facts are explained by a blowout of the right front tire (R. 307-308, 335). Such evidence, it is contended, is insufficient to prove reckless disregard for the rights of a guest.

There was, however, some testimony that Hair and Mrs. Newby had been drinking intoxicating liquor, but as above indicated, such is not relied upon in the pleadings. However, it appears in the record and must be considered. Both Hair and Mrs. Newby drank some intoxicating liquors (R. 297, 321). The odor of alcohol was upon her breath when taken to the hospital (R. 165-166). A fair presumption of the evidence is that she drank as much as Hair. During the trip, and particularly between Soda Springs and the point of the accident, she made no protest or objection as to the manner or method Hair drove the car and made no remark about his driving. She was in the front seat of the car and was just as able as was Hair to see what was going on (R.300-301). Under such circumstances, she assumed all risks attendant upon such a trip, including the rate of speed and the manner in which Hair operated the car, and was as a matter of law contributorily negligent if Hair did anything which might otherwise have violated the Guest Statute. Under such circumstances, there were no facts upon which a jury could pass in determining whether or not there was liability. The Court should have dismissed the case. This statement of the law is definitely supported by the great weight of authority.

In the case of Dale vs. Jaeger, 44 Ida. 576, 258 Pac. 1081, a guest was injured as result of an accident caused by excessive speed. The Court held a judgment of nonsuit should have been granted and that a gratuitous guest may not recover for his host's negligent operation of an automobile, if, conscious of apparent danger or faced with such conditions and circumstances as would herald danger to a reasonably prudent man,

he fails opportunely to protest and acquiesces therein; that while contributory negligence is generally a question of fact, it becomes a matter of law for the court's determination when established facts and circumstances permit only one possible conclusion to be drawn by a reasonably prudent man. The opinion of the court is digested in Syllabus No. 3 as follows:

> "Contributory negligence of gratuitous guest in automobile in failing to protest against driver's proceeding at excessive speed held to preclude recovery for injuries resulting when car left the road on a sharp curve and crashed into a telephone pole."

On page 580 of the Idaho Report, the court said:

> "The law is well settled by authorities too numerous to cite, that a gratuitous guest cannot recover for his host's negligent operation of an automobile, if conscious of apparent danger or faced with such conditions and circumstances as would herald danger to a reasonably prudent man, he fails opportunely to protest or acquiesces therein."

See also, the same effect, Dillon vs. Brooks, 51 Ida. 510, 6 Pac. (2d) 851.

In the case of French vs. Tibben, 53 Ida. 701, 27 Pac. (2d) 475, this same law is again applied by the Idaho Court in a case wherein there had been fast driving upon the highway and the guest and the driver had been drinking intoxicating liquors. The opinion of the court is well digested in the syllabi as follows:

> "Occupant of automobile is guilty of contributory negligence, precluding recovery against driver for injuries due to driver's intoxication if occupant furn-

ished liquor or knowingly rode with intoxicated driver."

Also

"Gratuitous guest cannot recover for host's negligent operation of automobile if guest is conscious of danger or faced with conditions indicating danger, and fails opportunely to protest."

In Whitsett vs. Morton (Cal.) 33 Pac. (2d) 54, it is held that it is contributory negligence for a guest to go to sleep while riding with intoxicated automobile driver.

In House vs. Schmelzer (Cal.) 40 Pac. (2d) 577, it is held that a guest who had been drinking with driver and who failed to notice driver's intoxicated condition, was contributorily negligent, precluding recovery for injuries received when automobile ran off the road and overturned.

In Schwartz vs. Johnson, Tenn. 280 S. W. 32, it is held that intoxicated guest accompanying intoxicated driver of an automobile operated at negligent speed was contributorily negligent precluding recover for death.

The foregoing cases, which are illustrative of the overwhelming weight of authority on this point, should preclude recovery as matter of law of appellees' claiming through and under Avenell Newby.

See also:

Willoughly vs. Driscoll (Ore.) 121 Pac. (2d) 917;

Packard vs. Quenel (Vt.) 22 Atl. (2d) 164.

Russell vs. Bayne (Ga.) 163 S. E. 290.

For the foregoing reasons ,therefore, it is contended that this case should never have been submitted to the jury, but that the Court should have directed a dismissal.

IV.

ERROR IN GIVING INSTRUCTIONS TO WHICH EXCEPTIONS WERE TAKEN, AND IN REFUSING TO GIVE CERTAIN REQUESTED STRUCTIONS.

ERRORS XVI to XXIX)

It is fundamental that the instructions to a jury must fairly cover the issues to support which evidence has been admitted. Furthermore, as said in Pullman Co. vs. Hall, 46 Fed. (2d) 399, on page 404 "It is reversible error to submit the evidence and theory of one party prominently and fully * * * and not to call attention to the main points of the opposite party's case." Defendant is entitled to have given to the jury proper instructions covering his theory of the case.

Idaho Gold Dredge Corp. vs. Boise Payette Lumber Co. (Ida.) 133 Pac. 1017;

Jones vs. Mikest, 60 Ida. 680, 95 P. (2d) 575;

Larsen vs. Bliss (N. Mex.) 91 Pac. (2d) 811.

Instructions should be clear and where contradictions appear therein, the cause may be reversed.

Skelton vs. Great Northern Ry. Co. (Mont.) 100 Pac. (2d) 929;

Westberg vs. Willde (Cal.) 94 Pac. (2d) 590.

While these principles are axiomatic, yet it is urged they were disregarded in the instant case. Appellants made formal exceptions to five instructions given by the Court and proposed ten which were refused. In each instance, the position of appellants and the reasons for excepting to, and proposing said instructions were given. The instructions and reasons appear verbatim and at length in the Specification of Errors. These reasons may also be considered as argument for appellants' position.

It must always be remembered that this is a case under the Idaho Guest Statute. Appellants were not drivers of the motor vehicle. They can, under no circumstances, be held to a greater degree of liability than the driver, who cannot be held for simple negligence, but for only a violation of the express provisions of the Statute.

See:

Gifford vs. Dice (Mich.) 257 N. W. 830;

Holmes vs. Wester (Mich.) 265 N. W. 492.

A. Error In Instructions Given

In the instruction quoted in Error XVI, the court, in effect, enlarged the responsibility of appellants beyond that of Hair by telling the jury that they could consider the Myers accident and the Dubois incident as against appellants but not as against Hair and, in this instruction, the Court referred to "evidence pertaining to the arrest and plea of guilty of Rulon D. Hair in Dubois, Idaho, in 1939 for an alleged violation

of a traffic law." During the trial, the Court had admitted evidence of this purported violation as against Hair but not as against appellants, save and except for Exhibit No. 22, which was a certified copy of a Probate Court record of Clark County touching a plea of guilty of *B.R. Hair* of *Soda Springs*, Idaho. If the Court meant to refer merely to the exhibit, the instruction certainly should have been so limited, but no such limitation appears and as the instruction was given to the jury, they could clearly consider all of the evidence touching the Dubois incident notwithstanding the fact that the oral testimony was not introduced as against appellants and Exhibit No. 22 was not such as could impart any information touching Rulon D. Hair of Pocatello. Nowhere in the instructions given was this matter in anywise cleared up. Furthermore, as heretofore pointed out, neither of these incidents, nor both of them taken together, constituted sufficient proof to establish the status of Hair as one habitually careless or incompetent. The instruction undoubtedly tended to mislead and confuse the jury.

In the instruction quoted in Error XVII, the Court attempted to summarize the Statute Law of Idaho covering ordinary negligence in the operation of a motor vehicle upon the highway. The jury was advised that it was unlawful for any person to drive any vehicle upon the highway caselessly and heedlessly without due caution and circumspection and at a speed in excess of thirty-five miles per hour. This entire instruction deals with simple negligence and is not in anywise involvd in a consderation of the Guest Statute. Exception was taken to the giving of the instruction, particularly because it

had no application in the present case, which was not controlled by the law of simple negligence, but by the requirements of the Guest Statute and that said instruction tended to confuse and mislead the jury as between the statute law of simple negligence, and the guest law requiring proof of different types of conduct, namely, intentional injury, intoxication or reckless disregard of the rights of others. A guest who is injured cannot recover simply because the driver has been negligent. He is limited in his rights of recovery to one of the three derelictions above mentioned. When the Court, therefore, instructed the jury that it was prima facie unlawful for any person to exceed the speed of thirty-five miles per hour upon the highway, it, in effect, told the jury that appellants were liable if an accident occurred from whatever cause if the car was being driven faster than thirty-five miles per hour. There was no occasion for any part or portion of this instruction to be given to the jury. It did not contain any law applicable to this case. Its effect was to enlarge in the minds of the jury the rights of a guest and to entirely eliminate the effect of the Guest Statute. It is submitted that there are no instructions which were given that could or did minimize the damaging effect of this instruction. This error alone is so prejudicial as to make it necessary to reverse the case.

The instruction quoted in Error XVIII advised the jury that a servant may be presumed prima facie to be acting in the course of his employment if at the time of the accident he is in possession of the master's automobile. Appellants excepted to such an instruction because it did not go far enough and advise the jury that such a presumption could be overcome

by evidence showing that the car was being used for other purposes. That unquestionably is the law, yet there is nothing in this or in any instruction of the Court giving the jury to understand that this presumption could be overcome. Furthermore, the Court had already given an instruction to the effect that "you are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile." To follow this up in the same set of instructions with the one to which appellants have taken exceptions, simply emphasizes the error of which appellants complain.

The instruction quoted in Error XIX, advised the jury that if Hair had previously to the 11th day of September, 1942, disobeyed instructions in the hauling of guests and such fact or facts were known to appellants or either of them, or if they could have determined such by ordinary diligence "then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business." The effect of this instruction was to simply tell the jury that if Hair disobeyed his instructions at any time—even once—and the appellants knew or could have known of it, then they could not contend that Hair was acting outside the scope of his authority or was "not attending to company business." An objection was taken to such instruction on the ground that it was too limited in its effect and did not consider the necessity that before such a restriction in the hauling of guests could be waived, the same must have been notorious and that an occasional breach could not be considered a waiver of this

right. The Court entirely overlooked that part of the law which has heretofore been discussed in this brief. The instruction was not cleared up in any other instruction and, it is urged, gave the jury the right to find against appellants on this point if Hair had at any time violated his instruction not to haul guests.

By the instruction quoted in Error XX, the Court advised the jury that if they found the death of Avenell Newby resulted from Hair's intoxication or reckless disregard of the rights of others and that either was the proximate cause of her death, the verdict should be for plaintiffs, if they should find for plaintiffs on other issues. In the first place, the complaint does not charge Hair with intoxication. It will be observed that the instruction fails to distinguish between the rights of Hair and those of appellants, but on the contrary simply advises the jury that if they find against Hair, they must find against appellants.

For the reasons heretofore recited, each instruction given and excepted to was erroneous and appellants most earnestly urge they were prejudicial.

B. Error In Refusing Requested Instructions.

In the requested instruction quoted in Error XXI, appellants sought to have the jury advised that a high rate of speed was not in and of itself reckless disregard of the rights of a guest. This instruction was refused. Its purpose was to overcome, if possible, the effect of the instruction heretofore complained of to the effect that speed in excess of thirty-five miles per hour was unlawful in a case of this character. Speed alone

is not evidence of either intoxication of the driver or willful disregard of the rights of others. See: Holmes vs. Wesler (Mich.), 265 N. W. 492. Appellants were entitled to have said instruction given in order to clear up this point.

Appellants also requested the Court to give that certain instruction quoted in Error XXII to the effect that if the jury believed from a preponderance of the evidence that Hair was forbidden to permit a guest to ride with him in the panel truck and "if you find this instruction was in full force and effect on the 11th day of September, 1942" but nevertheless he did haul Avenell Newby as his guest, they must find that he was not acting within the scope of his employment. Such expresses the law applicable to this case and the evidence adduced as is clearly apparent from such cases as:

> Chajnaclsi vs. Dougherty (Mich.) 236 N. W. 789;
> Albers vs. Shell Oil Co. (Cal.) 286 Pac. 752;
> Hartingan vs. Public Ledger (Pa.) 140 Atl. 524;
> Saltas vs. Affleck (Utah) 102 Pac. (2d) 493.

Appellants requested the Court to give the instruction quoted in Error XXIII to the effect that while there is a presumption that the driver of an automobile is the owner's agent, this presumption is rebuttable and if they should find that Hair, at the time of the accident, was using the automobile for his personal business or pleasure and not in the furtherance of the business of Donnelly or the Company, then the latter would not be liable for his misconduct. This instruction was particularly necessary because the jury had been instructed that the driver was presumed to be the owner's agent with no qualifications given nor advise that such presumption could

be overcome. It is not an answer to the failure to give this instruction that appellants were sought to be held upon another theory, because such theory failed of proof. The matters contained in this requested instruction were necessary to enable the jury to understand the fact that the driver could act outside the scope of his employment.

By the requested instruction quoted in Error XXIV, appellants sought to have the jury advised that if they found the prime objective of Rulon D. Hair was to take Avenell Newby to her home at the time the accident occurred, the fact that there might have been property in the truck prepared by the Tobacco Company would make no difference. This requested instruction was for the purpose of advising the jury that Hair could step outside the scope of his employment even though there were company products in the truck.

See: Allen vs. Ross (Ark.) 138 S. W. (2d) 409.

By the instruction quoted in Error XXV, appellants requested the Court to advise the jury in effect that if Avenell Newby joined with Hair in drinking intoxicating liquors and the two of them were riding in the car under the influence of liquor, she assumed the risk of any danger or damage that might result therefrom and was contributorily negligent. There was evidence that both had imbibed intoxicating liquor (R. 317, 321). This instruction should have been given under such cases as French vs. Tibben, 53 Ida. 701, 27 P. (2d) 475; House vs. Schrnelzer (Cal.) 40 P. (2d) 577.

By the instruction quoted in Error XXVI, appellants sought to have the jury advised that a gratuitous guest or his

heirs could not recover for an automobile accident if, conscious of apparent danger or faced with such circumstances as would herald danger to a reasonably prudent man, he nevertheless failed opportunely to protest and that if they believed Avenell Newby, acting as a prudent person, should have known that Rulon D. Hair was driving said automobile in reckless disregard of her rights or that he was intoxicated, nevertheless failed to protest or give him timely warning, there could be no recovery by appellees. The evidnce is clear to the effect that she made no protests to the manner in which Hair was driving, although she was in a position where she could have done so if he were conducting himself improperly (R. 301). Under such circumstances, the rule announced in Dale vs. Jaeger, 44 Ida. 576, 258 Pac. 1081 and Dillon vs. Brooks, 51 Ida. 510, 68 P. (2d) 851 required the giving of such instruction.

Appellants requested the Court to give the instruction quoted in Error XXVII advising the jury what evidence would be necessary before they could find appellants liable upon the theory that Hair was a reckless and incompetent driver. By its refusal to give this instruction the Court took from the jury one of the fundamental theories advanced by the appellants and a theory which is supported and sustained in such cases as: Guedon vs. Rooney (Ore.) 87 Pac. (2d) 209, and Pittsburgh Rwys. Co. vs. Thomas, 174 Fed. 501. The same argument likewise applies to the Court's refusal to give those instructions requested by appellants and quoted in Errors XXVIII and XXIX. This theory of the appellants was vital in their defense and they had a right to have the jury advised of the law controlling such a situation.

Upon the whole, appellants submit that their defense was not fully and fairly presented to the jury and that the Court erred in each instance wherein complaint is made with reference to instructions.

CONCLUSION

In conclusion, therefore, appellants most respectfully urge that the learned Trial Court erred in the particulars hereinbefore recited and that the judgment entered against appellants cannot stand but that such judgment should be reversed with directions to dismiss said cause against appellants.

Respectfully submitted,

E. B. SMITH
Residence and Post Office Address
Boise, Idaho

A. L. MERRILL
R. D. MERRILL
Residence and Post Office Address
Pocatello, Idaho

APPENDIX "1"

Section 48-901 Idaho Code Annotated As Amended by Chapter 160 of the 1939 Session Laws

48-901. LIABILITY OF MOTOR OWNER TO GUEST. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his * * *intoxication* or his reckless disregard of the rights of others.

APPENDIX "2"

Plaintiffs' Exhibit No. 22

Probate Docket. Case 258. State of Idaho, Plaintiff, vs. B. R. Hair, Defendant.

In the Probate Court of Clark County, State of Idaho. Before Honorable William A. Patt, Probate Judge. Be it remembered that on this 19th day of July 1939. Complaint in writing on oath of Sid Close, Sheriff was filed, alleging that B. R. Hair of Soda Springs, Idaho, on or about the 19th day of July 1939 at Dubois in the County of Clark, State of Idaho, then and there being did then and there commit a misdemeanor, to-wit: by driving a motor vehicle on the public highway in a reckless manner. 18th day of July 1939, Warrant issued and delivered to Sid Close, Sheriff, for service. 19th day of July 1939 warrant returned. 19th day of July 1939, Defendant in Court, complaint read, and to said complaint he entered a

plea of guilty. Case set for trial 10 o'clock A. M. Defendant fined $50.00 and $5.00 court costs. $55.00 fine and court costs paid. The defendant discharged. William A. Patt, Probate Judge. 19, supoena issued for_____ witness on the part of the prosecution, delivered to_____ for service _____19 , Supoena returned, served on_____19 , Jury_____by_____ ____and venire issued to_____for service, returnable_____19 , at_____o'clock M. Attroneys, John Black, Pocatello, Idaho for Plaintiff_____ _____for defendant.

Costs, Officers' costs $3.00 Sheriff fee $2.00 total $5.00 Witness fees, --Plff. Total Witness fees—Deft. Total Jurors' fees. Total. Total fees.

State of Idaho,
County of Clark—ss.

I, J. N. Hoppes, Probate Judge of the Probate Court, in and for Clark County, State of Idaho, do hereby certify that the above and foregoing is a full, true and correct copy of the judgment docket in the case of the State of Idaho, vs. B. R. Hair, as appears from the Book 1 Probate Dockets Criminal, Clark County, page 258, and that the Judgment Docket from which said copy was made is the official criminal docket of the Probate Court of Clark County, State of Idaho.

In Testimony Whereof, I the said Probate Judge have hereunto set my hand and affixed the seal of said Court this 8th day of October, 1943.

(Seal Probate Court) J. N. Hoops, Probate Judge.